No. 09-1056

In The Supreme Court of the United States

BOBBY LEE CUTTS, JR.,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio, Stark County

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN D. FERRERO,
Prosecuting Attorney,
Stark County, Ohio

RONALD MARK CALDWELL*
Ohio Sup. Ct. Reg. No. 0030663
Assistant Prosecuting Attorney
KATHLEEN O. TATARSKY
Ohio Sup. Ct. Reg. No. 0017115
Assistant Prosecuting Attorney
STARK COUNTY PROSECUTOR'S OFFICE
110 Central Plaza, South
Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7965
RMCaldwe@co.stark.oh.us

**Counsel of Record for Respondent*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

A jury found Bobby Lee Cutts, Jr., guilty of the murder of his girlfriend, Jessie Marie Davis, who was nine-months pregnant with his daughter, as well as guilty of the aggravated murder of their unborn but viable daughter, Chloe, during a late night visit to her home. As a result of his convictions, Cutts is serving a term of imprisonment of life, with parole eligibility after serving 57 years. The questions presented in his appeal are:

1. Whether Cutts is entitled to this Court's review of issues he has raised in the state courts below that raise no federal claim, apart from a generalized due process claim, and instead are primarily challenges to state court application of state law.

2. Whether Cutts is entitled to this Court's review of issues where he is simply seeking correction of alleged errors by the state courts below in the application of relevant law to the facts.

3. Whether Cutts is entitled to this Court's review of issues related to jury selection and composition when he has chosen not to include as part of the record on appeal any transcript of the extensive jury review and selection proceedings.

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STATEMENT OF CASE

In June of 2007, petitioner, Bobby Lee Cutts, Jr., killed Jessie Marie Davis, who was nine months pregnant with their unborn yet viable daughter Chloe, and then dumped them in a field to rot. Eight days later, when confronted with evidence that contradicted his alibi story, Cutts, a police officer, led the law enforcement team investigating the young mother's disappearance to the spot where he had dragged and dumped their bodies. A state grand jury indicted Cutts for the homicides of Jessie Marie Davis and Chloe. The charges in the indictment were three counts of aggravated murder with death penalty specifications, one count of aggravated burglary, two counts of gross abuse of a corpse, and one count of child endangering. A jury convicted Cutts of all of the charged offenses except for the aggravated murder of Davis, finding him guilty of the lesser offense of murder. After a penalty hearing, the jury recommended a life sentence with parole eligibility after serving thirty full years for the two aggravated murder convictions for Chloe's death. The trial court accepted the jury's recommendation for these two convictions, but merged the offenses for purposes of sentencing. This life term of imprisonment was imposed consecutively to the other prison sentences imposed for a sentence of 57 years.

On appeal, the state court of appeals overruled all of Cutts' legal claims and affirmed his convictions

and sentences. Cutts' subsequent appeal to the state's supreme court was rejected.[1]

The facts here are extensively detailed in the opinion of the court of appeals and differ significantly from the version of events Cutts set forth in his petition, which was based upon his self-serving testimony at trial, Appendix A, Petition for Writ of Certiorari.

When Patricia Porter couldn't reach her daughter, Jessie Marie Davis, on the telephone, she went to her home. Porter was concerned because Jessie was nine months pregnant, ready to deliver her baby daughter, Chloe, in about two weeks, and she had not talked with her daughter for two days.[2] When Porter arrived at Jessie's home, she found the usually well kept home in disarray. Blake, Jessie's two year old son, came running down the stairs, his diaper dripping with urine and feces. Porter asked her grandchild, "Blakey, where is Mommy?" Blake responded, "Mommy is crying, Mommy broke the table, Mommy is in the rug."[3] Scared, Porter ran through the house hollering for Jessie. Upon entering Jessie's bedroom, she saw a table and lamp knocked over and the mattress off its box springs. There was bleach poured

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[1] *State v. Cutts*, Stark App. No. 2008 CA00079, 2009-Ohio-3563, 2009 WL 2170687, *appeal denied*, 123 Ohio St.3d 1509, 2009-Ohio-6210, 917 N.E.2d 812.

[2] Tr. I, 75.

[3] Tr. I, 84.

all over the floor with a bleach bottle sitting on the floor by the bed. Porter also noticed that the bed's blue and gold print comforter was missing.[4] Unable to find Jessie, Porter called 911 and told her daughter, Audrey, to call Cutts, Blake's father and the alleged father of Chloe.

A deputy sheriff responded to the 911 call of a missing person and possible burglary. Cutts arrived about ten minutes later dressed in his police uniform.[5] When Blake saw Cutts, he started to cry.[6]

Deputy Sheriff Sgt. Eric Weisburn responded to the scene as the lead investigator. Weisburn noticed that Cutts had a band-aid on his pinky finger and when asked about it, Cutts explained that he had cut it while cleaning the patio fireplace at his home.[7]

Weisburn interviewed Cutts who feigned ignorance of Jessie's whereabouts, concocting a story that he had made a number of calls to Jessie's cell phone when she did not drop Blake off at his home to babysit.[8]

With his attention focused on finding Jessie and her child, Weisburn asked Blake where his mommy was, and Blake replied that she was at work.

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[4] Tr. I, 85.

[5] Tr. I, 165, 185, 190.

[6] Tr. I, 103.

[7] Tr. I, 219.

[8] Tr. I, 220, State's Exh. 1.

Spontaneously, Blake then repeated what he had previously told Porter.[9]

In a subsequent interview, Cutts continued his charade of innocence telling Weisburn about his calls to Jessie's cell phone, that he had picked up Myisha Ferrell, a friend, to babysit Blake while he was at football practice, and gave him several names of potential witnesses, again denying any knowledge of Jessie's whereabouts. Cutts even showed Weisburn the patio fireplace where he told Weisburn he had cut his pinky finger.[10]

Because Jessie was missing and was due to deliver in a couple weeks, the community organized a number of searches conducted by volunteers to try to find Jessie. Cutts participated in these search efforts.

The week following Jessie's disappearance, the FBI joined the sheriff's team of investigators to search for Jessie and Chloe.[11] The team found discrepancies in Cutts' story. For one thing, the team learned that after Cutts left a local bar, he visited Stephanie Hawthorne, a person he did not mention in previous conversations with the team. For another thing, they learned that a telephone call Cutts made to Jessie's cell phone around 7:15 a.m. on June 14, 2007 was made from a location in Summit County

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[9] Tr. I, 223, 229.

[10] Tr. I, 242.

[11] Tr. I, 253.

and not from his residence in Plain Township as Cutts had claimed.[12]

Meanwhile, Cutts continued his charade, denying involvement with Jessie's disappearance, expressing his anguish at her loss and hopes that she would be found alive. The distraught Cutts did not report to work that week instead staying in his home visiting with his friends and family and playing video games. Cutts also gave a recorded interview with local news media.[13]

Finally, eight days after Jessie's and Chloe's disappearance, when confronted with evidence that his one call to Jessie on the morning of her disappearance was not made from his home, Cutts told the law enforcement team he would now show them where the bodies of Jessie and Chloe were located.[14] Cutts finally directed the team to an area in a park field where he had dumped the bodies of Jessie and Chloe.[15]

Dr. Lisa Kohler performed autopsies the next day. Jessie's body was in an advanced stage of decomposition. Jessie's abdomen, kidneys, liver, spleen, pancreas, eyes and brain were gone. Some bones in the neck, part of the hyoid bone and some fingertips

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[12] Tr. I, 260.

[13] Tr. VI, 315.

[14] Tr. II, 318.

[15] Tr. II, 318.

and toes were also missing.[16] The skeletal body of Chloe was contained within Jessie's remains. The bodies were also in an advanced stage of "putrefaction," common to being left in an area exposed to the hot sun and insect penetration.[17]

Because of the condition of the bodies, Kohler was not able to determine the mechanism of death. Kohler opined, however, that if the body of Jessie would have been recovered earlier, the specific cause of death could have been determined.[18] Still, based on the autopsy, review of medical records, and law enforcement reports, the cause of death was ruled "unspecified homicidal violence . . . Ms. Davis had come to harm at "the hands of another individual."

Kohler made another significant finding – baby Chloe was viable and if she had been born at the time of her mother Jessie's death, she would have survived outside of her mother's womb. This medical opinion was shared by Dr. Craig Polifrone, Jessie's obstetrician, who examined Jessie days before her disappearance and saw a normal, happy and healthy mother, as well as a healthy and viable fetus.[19]

After killing Jessie and Chloe, Cutts picked up his high school friend, Myisha Ferrell, during the

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[16] Tr. IV, 1264, 1271.

[17] Tr. V, 1264.

[18] Tr. V, 1283.

[19] Tr. IV, 1242, 1244, 1304, 1306.

early morning of June 14, 2007, driving his green truck. Cutts told her he needed some help and that something had happened. The pair traveled north on I-77, with Cutts talking in spurts, saying something was wrong with the baby's mother and that she was "in the back." Ferrell asked Cutts what had happened, and Cutts responded by raising his arm and putting it by his neck, never suggesting that Jessie's death was accidental.[20]

Cutts eventually stopped at an open field in a secluded area. The pair exited the truck, and Ferrell saw in the bed of the truck a body wrapped in a blanket with a pair of feet sticking out. Ferrell also saw a few bags in the back with a material resembling a burgundy print. After Cutts dumped the bodies of Jessie and Chloe, he returned to the truck. On the way back to Canton, he stopped to drop the plastic bags in a dumpster, and later stopped at a car wash where he sprayed the bed of his truck with water. In the bed of his truck, he replaced Jessie and Chloe's bodies with mulch he picked up at a gas station.[21] Cutts then threw Jessie's cell phone out the window, but only after calling her cell phone number and leaving a message claiming that she had never showed up to drop Blake off and complaining that her actions deprived him of sleep.

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[20] Tr. II, 417-418, 421.

[21] Tr. II, 423-427.

Cutts took Ferrell back to his house where he showered and changed, asking Ferrell if she could see any marks on his chest. Ferrell saw none, but observed a cut on Cutts' pinky finger. Cutts told her he received the cut when Jessie bit his finger. Cutts then gave Ferrell $100 and told her he wished he could give her more.

At trial, Cutts testified in his own defense, giving a self-serving statement, a version the jury did not find credible. Cutts admitted to being at Jessie's home that early morning. He found Jessie on the floor in her bedroom. When she was slow in getting up, Cutts told her to hurry. When Jessie was slow in responding, Cutts ordered her again to "hurry up," because "I want to get back to bed." Cutts claimed an argument ensued that resulted in Jessie biting his finger when he waved it in front of her face. As a result, Cutts turned to leave the bedroom when Jessie allegedly grabbed him from behind to prevent him from leaving. Cutts claimed that he accidentally swung his elbow to ward her off of him.

According to Cutts, this swing of his elbow landed in Jessie's throat area,[22] and she hit the floor very hard. Getting no response from Jessie, Cutts did not call 911, instead trying CPR. Cutts checked her pulse and found none. When CPR was unsuccessful, he started chest compressions. He next found a bottle of bleach, poured some in the cap and put it under her

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[22] Davis stood 5'4" tall, while Cutts was six feet tall.

nose.[23] Jessie's cell phone was in the charger, but Cutts, claiming he could not turn it on, did not call for emergency help. Even though his cell phone was in his truck, Cutts did not use it to call for emergency help.

Cutts ultimately decided to leave in his truck with the body of Jessie and Chloe, wrapped in the truck bed in a comforter.[24] In leaving the house with the bodies, Cutts knowingly left his toddler son, Blake, in the home by himself. Cutts did nothing to alert authorities to Jessie's disappearance or to Blake's presence in the home by himself.

REASONS FOR DENYING THE WRIT

I. Inconsistent Jury Verdicts

Cutts' first claim argues that the jury's verdicts in this case are inconsistent, and thus the court of appeals erred in not vacating his convictions and in affirming the trial court's overruling his mistrial motion. Cutts' argument is not based on a federal constitutional claim, but is instead based on the state courts' application of state law. Cutts has therefore failed to assert a federal claim triggering this Court's jurisdiction, and the claim should be rejected on this ground. Assuming, however, that Cutts' claim does

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[23] Tr. V, 210-212.

[24] Tr. V, 200.

sufficiently raise a federal claim, it nonetheless fails on the merits. First, the verdicts are not inconsistent since they involved two separate victims, as well as separate homicidal acts with differing animus for each of their deaths. In other words, the acts and mental element for the death of Jessie Davis was found to be different than the acts and mental element that resulted in Chloe's death. And second, "inconsistent verdicts are constitutionally tolerable."[25] In other words, a criminal defendant is not deprived of due process simply because the jury returns inconsistent verdicts. Thus, the trial court did not err or abuse its discretion in overruling Cutts' mistrial motion challenging the verdicts.

Since nothing under the federal constitution bars inconsistent verdicts, the court of appeals looked to Ohio law that defined the parameters for inconsistent verdicts. Under Ohio law, an indictment containing more than one count is not interdependent and an inconsistent verdict does not result from inconsistent responses to different counts. Inconsistent verdicts

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[25] *Dowling v. United States*, 493 U.S. 342, 353-354 (1990); *Standefer v. United States*, 447 U.S. 10, 25 (1980) ("While symmetry of results may be intellectually satisfying, it is not required."); *Hamling v. United States*, 418 U.S. 87, 101 (1974) ("It has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required."); *United States v. Dotterweich*, 320 U.S. 277, 279 (1943); *Dunn v. United States*, 284 U.S. 390, 393 (1932) ("Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.").

arise only out of inconsistent responses to the same count.[26] The verdicts in this case were not inconsistent. The jury did return different verdicts pertaining to the deaths of Jessie Marie Davis and her unborn child Chloe, but those verdicts are based on differing animus and actions that led to each death. The crucial difference between their deaths, which Cutts ignores in his argument, is the difference in timing of the deaths. Jessie was but two weeks from her scheduled due date, and Chloe survived after her mother's death. Prompt medical attention could have saved Chloe's life, despite the fact that her mother was dead. Cutts, a trained police officer, chose, however, to do nothing and let his unborn daughter die. Since he had already perpetrated homicidal violence on Davis, Cutts was now a trespasser who had committed the crime of murder; his continued presence in the Davis residence and allowing his unborn daughter to die as a result of his actions was a callous, calculated, and purposeful decision to cause her death, separate and apart from his intent and actions vis-á-vis Chloe's mother.

Under these facts and circumstances, the verdicts in this case relative to the separate deaths of

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[26] *See, e.g., State v. Lovejoy*, 79 Ohio St.3d 440, 1997-Ohio-371, 683 N.E.2d 1112, paragraph one of the syllabus ("The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count.").

Jessie Marie Davis and her unborn daughter Chloe were not inconsistent. His failure to act to save his daughter constitutes a separate act and a separate animus from Cutts' actions and intent in killing Davis.

II. Change of Venue – Pretrial Publicity

Cutts argues that extensive pretrial publicity about the disappearance of Jessie and his subsequent arrest was so pervasive as to preclude a fair trial. Cutts in fact makes allegations in his petition about this publicity in an attempt to show that a fair trial was impossible, allegations that are not supported by the record in this case. Cutts chose to exclude from the record on appeal a transcript of the extensive jury selection process, and the record that was made part of this appeal does not support Cutts' sweeping and exaggerated claims. The trial court had prospective jurors fill out an extensive questionnaire that focused, among other things, on pretrial publicity. In addition, the trial was delayed many months to allow community passions to die down. Finally, the record does not refute that the court extensively inquired of all jurors about what they knew about the case, and whether they could put any such knowledge aside and judge the case solely on the evidence admitted at trial and the instructions of law provided by the court. As a result of these extensive measures, which were noted by the majority of the court of appeals below and the dissenting judge, a fair and impartial jury was selected that not only resulted in an acquittal of Cutts

for the aggravated murder of Jessie, but also resulted in a recommendation of a life sentence as opposed to the death penalty for the death of Chloe. Under these facts and circumstances, Cutts was not denied a fair trial by the unsubstantiated allegations set forth in his brief.

Cutts' argument is in part a federal claim, although the primary focus of his argument is on state law. The law in Ohio is that the examination of jurors during voir dire affords the best test to determine prejudice from pretrial publicity. The mere fact that there has been extensive pretrial publicity and exposure to prospective jurors does not necessarily mean that a fair and unbiased jury cannot be chosen and that a change of venue is mandated.[27] There is no requirement that prospective jurors be totally ignorant of the facts and issues of a particular case.[28] Thus, a careful and searching voir dire is the appropriate and adequate vehicle for determining whether prospective jurors can put aside whatever they have been exposed to about the case and judge the case

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[27] *See, e.g., State v. White*, 82 Ohio St.3d 16, 21, 1998-Ohio-363, 693 N.E.2d 772, 777-778, *cert. denied*, 525 U.S. 1057 (1998) (noting that it will be rare for a court to presume prejudice from pretrial publicity). *See also Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554 (1976) (noting that "pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial").

[28] *See State v. Thompson*, 33 Ohio St.3d 1, 5, 514 N.E.2d 407, 412 (1987). *See also Irwin v. Dowd*, 366 U.S. 717, 722 (1961).

solely on the facts and law presented to them at trial.[29] Finally, the trial court's decision regarding a change of venue is reviewed under the deferential abuse of discretion standard – that the court's ruling will be affirmed unless it is unreasonable, arbitrary, or unconscionable.[30]

Cutts failed to include the transcript of the voir dire in this case to show that prospective jurors could not be fair and impartial. These assertions, apparently based solely on the jurors' questionnaire answers, cannot be supported with any reliability without a review of the voir dire itself. Under these facts and circumstances, Cutts has failed to satisfy his burden of showing an abuse of discretion in the trial court's ruling on his motion for change of venue.[31]

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[29] *See, e.g., State v. Maurer*, 15 Ohio St.3d 239, 252, 473 N.E.2d 768, 781-782 (1984), *cert. denied*, 472 U.S. 1012. *See also Patton v. Yount*, 467 U.S. 1025, 1035 (1984).

[30] *See, e.g., State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶¶ 60-61, *cert. denied*, 548 U.S. 912 (2006).

[31] *See, e.g., United States v. Rahman*, 189 F.3d 88, 121-122 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000) (upholding denial of change of venue ruling by then District Judge Michael B. Mukasey in high publicity trial for seditious conspiracy arising from plots to bomb buildings, tunnels, and bridges in New York City and approving of Judge Mukasey's searching voir dire).

Cutts relies upon this Court's decision in *Sheppard*[32] and *Estes*[33] in making his federal claim. Neither case, however, is instructive or applicable to Cutts' specific claim. Both cases dealt with the impact of pretrial publicity on the criminal trial, but they also focused on the conduct of the trial itself. Cutts makes no claim in his appeal that his trial was conducted in a carnival environment because of the presence of the press and the trial court's failure to protect the jury from media contamination, as was the case in both *Sheppard* and *Estes*.

In *Sheppard*, for example, there was extensive pretrial publicity relating to the brutal murder of Dr. Sam Sheppard's wife. This Court reversed his Dr. Sheppard's murder conviction not on this basis alone,[34] however, but on the failure of the trial court to protect him from inherently prejudicial publicity and to control disruptive influences of the media in the courtroom during the trial. This Court specifically stressed the "carnival atmosphere at trial" in its opinion, and the failure of the trial court to take measures to prevent this denial of due process. Cutts does not claim that his criminal trial resembled in any way

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[32] *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

[33] *Estes v. Texas*, 381 U.S. 532 (1965).

[34] *Sheppard*, 384 U.S. at 354-355 ("While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held.").

the "carnival" trial that characterized the *Sheppard* trial.

In *Estes*, this Court set aside a criminal conviction based again on pretrial publicity as well as the media's impact on the trial itself. Unlike the situation in *Sheppard*, there was a change in venue in *Estes*, as well as a sequestration of the jury, yet the media coverage of the trial turned the jurors into celebrities due to the judge's failure to insulate them from the media. Furthermore, this Court took exception to the failure of the trial court to take corrective measures to prevent the contamination of the jury from media coverage during the trial itself, allowing the trial to be televised in a highly sensational manner. In the instant case, however, Cutts does not make a claim that the conduct of the trial itself was compromised by contemporaneous media coverage of the trial. Instead, his claim is limited to a per se challenge to the conduct of any trial in Stark County due to the pretrial publicity.

Finally, Cutts claims that the pretrial publicity in this case, which was not only local, but also statewide and national, was so pervasive and sensational that no unbiased jury could be selected in Stark County. Yet, since this same pretrial publicity was present throughout Ohio, Cutts could then make the same arguments no matter where the trial was conducted in Ohio, and regardless of the prophylactic measures implemented by the trial judge to secure an unbiased and impartial jury. Such an argument claims too

much, especially given the incomplete record in this case.

III. Juror Who Searched

Cutts argues that his constitutional right to a trial by a fair and impartial jury was violated when the trial court denied his request to remove a juror who had participated in the search for Jesse and Chloe while they were missing. His argument is essentially a per se claim since he cannot demonstrate that the juror was in any way biased or partial, based upon the partial record Cutts has opted to have reviewed. The sole connection that the juror in questions had to this case was her participation in the search for Jesse and Chloe in Stark County, where nothing was found since Cutts had taken the bodies to Summit County.

Furthermore, Cutts' argument that any potential juror who either participated in the search for Jessie and Chloe is per se a partial and biased juror is without merit. The search was for missing persons who may or may not have been the victims of criminal conduct. The search was not for the killer of Jessie and Chloe. Furthermore, the search did not uncover any evidence for the simple reason that the bodies were not in Stark County, as Cutts well knew. Under these circumstances, as well as the state of the record in this appeal, Cutts has not demonstrated that he was denied a fair trial by the inclusion of a biased and partial juror.

IV. Lesser Included Jury Instruction – Involuntary Manslaughter

Cutts' fourth claim challenges the ruling of the court of appeals that affirmed the trial court's decision not to instruct the jury on the lesser included offense of involuntary manslaughter. While this challenge is couched in the terms of a general due process claim, the challenge is essentially one challenging the application of state law. Assuming, however, that Cutts has properly triggered this Court's jurisdiction by raising a nebulous federal claim, his challenge is still without merit. The trial court in this case held that the evidence presented at trial did not support the involuntary manslaughter instruction. This ruling was properly upheld on appeal since the record did not support such an instruction.

As part of its jury charge, the trial court instructed on the lesser included offense of murder, but denied Cutts' request for a charge of involuntary manslaughter (based on the misdemeanor offense of domestic violence). The jury request went to Davis' death, and not to the subsequent death of Chloe. In so ruling, the trial court noted that Cutts had pursued a complete defense vis-á-vis Davis' death.

Cutts argues that the evidence could lead the jury to the conclusion that Cutts recklessly caused Jessie's death as a proximate result of committing the misdemeanor offense of domestic violence. This argument, however, was undercut by Cutts' defense at trial, which was the complete defense of accident.

Cutts testified that he swung his elbow in an effort to get away from Jessie, and that he did not intend to strike the pregnant woman in the throat, causing her apparently immediate death. Cutts did not testify that he recklessly struck Jessie, but instead that he never intended to strike her. Thus, the evidence at trial did not support the requested instruction for involuntary manslaughter, which would have required Cutts to have admitted to striking Jessie with the intent of harming her. No crime was therefore committed, according to Cutts, since he was only trying to slip Jessie's grasp of him, and did not act recklessly in striking Davis in committing the offense of domestic violence.

The ruling of the court of appeals in this case was consistent with Ohio law governing such jury instructions. The issue in this claim is whether the evidence supported an instruction on the lesser included offense of involuntary manslaughter.[35] The Ohio Supreme Court held in 1988 that involuntary manslaughter is a lesser included offense of aggravated murder.[36] The state supreme court has continuously followed this holding in *Thomas* in reviewing this

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[35] *See State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

[36] *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), paragraph one of the syllabus, *cert. denied*, 493 U.S. 826 (1989).

specific claim.[37] But the court has also followed the other requirement for a lesser-included-offense instruction set forth in *Thomas* – that sufficient evidence is presented that would allow a jury to reject the greater offense and to find the defendant guilty of the lesser included offense.[38] The supreme court noted in *Thomas* that a defendant must show more than the fact that one offense is a lesser included offense – he must also show that "the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense."[39] Under this standard, therefore, the courts below correctly followed Ohio law in holding that the evidence presented in this case did not warrant a jury instruction for involuntary manslaughter.

V. Jury Selection – Ohio Driver's Licenses

Cutts' fifth claim once again fails to raise a clear claim under the federal constitution, and instead takes issue with how the state courts below applied state law. In this case, Ohio permits the jury pool to be selected from the rolls of registered voters. Cutts

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[37] *See, e.g., State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 132; *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 36; *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶ 79.

[38] *See Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, at ¶ 134.

[39] *Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286, at paragraph two of the syllabus.

argues that this statutory scheme is flawed and discriminatory, and that the trial court should have selected this pool from a list of Ohio driver's license holders in Stark County. Since Cutts has failed to raise a clear federal claim, he has failed to properly invoke this Court's jurisdiction on this claim. In addition, his claim was without merit under Ohio law. Finally, Cutts' factual claims made in support of this challenge are not supported by the partial record in this case.

Cutts' argument ignores the precedent of this Court and the Ohio Supreme Court applying federal and state law, which have held that use of voter registration rolls to select juries does not violate a criminal defendant's right to a fair and impartial jury that represents a fair cross section of the community.

The Sixth Amendment to the United States Constitution does not require that petit juries "mirror the community and reflect the various distinctive groups in the population."[40] The Sixth Amendment, however, does require that the method used for selecting the groups from which juries are drawn "must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[41]

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[40] *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

[41] *Taylor*, 419 U.S. at 538.

In order to make this showing of a prima facie violation of the Sixth Amendment's fair cross section requirement, a criminal defendant must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."[42] The Ohio Supreme Court has specifically followed and applied this *Duren* standard.[43]

For purposes of fair-cross-section analysis, African-Americans are a distinctive group.[44] With regard to the second prong of the *Duren* standard, Cutts has failed to demonstrate in this partial record that excludes jury selection that African-Americans in Stark County are unfairly represented in venires relative to their numbers in the community. Finally, with regard to the third prong of the *Duren* standard,

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[42] *Duren v. Missouri*, 439 U.S. 357, 364 (1979). *See also Berghuis v. Smith*, ___ U.S. ___ (decided March 30, 2010), 2010 WL 1189555 (reaffirming the *Duren* standard in applying to a federal habeas corpus challenge to the alleged exclusion of women from jury pools).

[43] *State v. Fulton*, 57 Ohio St.3d 120, 566 N.E.2d 1195 (1991), paragraph two of the syllabus (reviewing systematic, *per se* exclusion of persons of the Amish religious faith).

[44] *State v. Jones*, 91 Ohio St.3d 335, 340, 2001-Ohio-57, 744 N.E.2d 1163, 1172-1173. *See also United States v. Buchanan*, 213 F.3d 302, 309-310 (6th Cir. 2000).

use of the voter registration rolls does not result in systematic exclusion of African-Americans in Stark County since this method is not a vehicle that is designed to or results in their systematic exclusion.[45]

Finally, Cutts has failed to adequately preserve this issue for appellate review by his failure to include a transcript of the voir dire and jury selection process. He thus cannot make a factual basis for his systematic-exclusion argument. Under these facts and circumstances, he has failed to demonstrate unfair representation of African-Americans on Stark County juries, as well as on his particular jury, or that such alleged under-representation resulted from a systematic exclusion of that group by the state.[46]

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[45] *See, e.g., State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, at ¶ 66.

[46] In addition, federal jury pools are also drawn from voter registrations under 28 U.S.C. §1863(b), and constitutional challenges to this selection method have been rejected. *See United States v. Odeneal*, 517 F.3d 406, 412 (6th Cir. 2008) ("The circuit courts are " 'in complete agreement that . . . neither the Act nor the Constitution require that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than the rest of the population.' ") (citing list of cases); *United States v. Test*, 550 F.2d 577, 587 n.8 (10th Cir. 1976); *United States v. Forest* (C.A. 6, 2004), 355 F.3d 942, 953-954, *cert. denied*, 543 U.S. 856 (2004) (rejecting *Duren* challenge to jury pools in Akron on basis that African-Americans are underrepresented).

VI. Grand Jury Testimony

Cutts argues that he was denied due process by the trial court declining to require the prosecution to disclose grand jury testimony. Cutts had sought the disclosure of the grand jury testimony of Courtenay Robinson, Adrena Snell, Stark County Sergeant Weisburn, various FBI agents and Richard Mitchell. The courts below held that Cutts had not shown a particularized need for such testimony based upon applicable state law. As such, Cutts once again raises a state law claim that does not trigger this Court's jurisdiction. Assuming that jurisdiction has been triggered, however, Cutts' claim is nonetheless without merit since he did not show a particularized need for this testimony.

Under Ohio law, grand jury proceedings are secret and an accused is not entitled to inspect grand jury material either before or during trial unless the ends of justice require it. In other words, the defendant must show a particularized need and disclosure that outweighs the need for secrecy. The decision whether to release grand jury testimony is within the discretion of the trial court and will not be reversed absent an abuse of discretion. The standard is not different for a death penalty case.[47]

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[47] *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032; *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215.

Before trial, Cutts filed two motions to disclose grand jury testimony. The motions were denied based upon a finding by the trial court that Cutts had failed to demonstrate a particularized need.[48] The trial court did not abuse its discretion in so ruling, especially since Cutts' attempts were nothing more than a fishing expedition to circumvent the criminal rules of discovery. The State had complied with the discovery requirements of Ohio Crim. R. 16 and provided to Cutts the names of the witnesses it intended to call at his trial and the inculpatory statements of the co-defendant Myisha Ferrell.

Cutts uses the testimony of Richard Mitchell that Cutts had previously threatened to "kill that bitch and throw her in the woods" as proof of his pretrial need for the grand jury testimony. Yet, Cutts did not ask for the pretrial disclosure of Mitchell's grand jury testimony and the statement was not made to law enforcement personnel. What is more, the State disclosed the name of Richard Mitchell to Cutts as a potential witness and indeed Cutts' investigator interviewed him.

Cutts also claims that he demonstrated a particularized need for grand jury testimony of FBI agents and law enforcement officers to show the evidence of aggravated burglary, as alleged in the indictment, an allegation also set forth in Cutts' unsuccessful motion to dismiss. Cutts ignores Ohio law that holds

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[48] Tr. Motion Nov. 16, 2007, 16.

that any privilege to be on and remain on property is revoked when an act of violence is directed against the person holding the ability to revoke the privilege of initial entry.[49]

Finally, Cutts argues that he was entitled to the disclosure of this grand jury testimony due to the simple fact that his case was a capital case. As a result, Ohio's law that requires a showing of a particularized need for grand jury testimony to warrant disclosure of it violates this Court's basic capital jurisprudence that regards the death penalty as different from other, non-capital cases. The cases Cutts relies upon for this proposition, however, deal with the requirement that the capital jury's discretion should not be limited in its consideration of mitigating factors in order to reach an individualized sentencing decision, and do not stand for the proposition advanced by Cutts.[50]

VII. Blake's Hearsay Statements

Cutts challenges the admission of the hearsay statements of his two year old son, Blake, whom Cutts had abandoned after killing Blake's mother and removing her from the house. When Jessie's mother finally came to the house two days later to check on

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[49] *See State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987), *cert. denied*, 485 U.S. 916 (1988).

[50] *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Jessie, Porter not only discovered that her pregnant daughter was missing, but that Blake had been left in the house by himself. The trial court admitted Blake's statements to his grandmother on the ground that the statements constituted excited utterances, and were thus admissible under Ohio Evid. R. 803(2).[51] The trial court also admitted Blake's statements to Detective Weisburn on the ground that the statements were made in response to an ongoing emergency, i.e., the unexplained disappearance of his pregnant mother. The court of appeals upheld the trial court's ruling, holding that the admission of Blake's statements did not violate *Crawford*.[52] These rulings were consistent with this Court's developing jurisprudence post-*Crawford*.

The trial court conducted a pretrial hearing to determine the admissibility of Blake's statements. Both Porter and Sgt. Weisburn testified at this pretrial hearing. Porter testified that when she arrived at Davis' home two days after hearing from her daughter last, she noticed that Davis' purse was all over the floor. Blake then came downstairs upon hearing his grandmother. Porter smelled him before she saw him since his diaper was wet and soiled after not being changed for two days. "Where is Mommy?" Porter asked her grandson. "Mommy crying. Mommy

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[51] Ohio Evid. R. 803(2): "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

[52] *Crawford v. Washington*, 541 U.S. 36 (2004).

broke the table. Mommy in the rug," was the toddler's response. Instead of his friendly and smiley self, Blake just had a very blank stare upon going to his grandmother.[53]

Sgt. Weisburn testified that he responded to the Davis residence on the morning of June 15th to investigate a missing pregnant woman. He ascertained that the toddler Blake was apparently left alone in the home for two days. His primary concern was the location and well-being of this very pregnant woman. In an effort to find out where Jessie might be, Weisburn talked with Blake. The toddler repeated his words, that his mother was crying, that she broke the table, and that she was in the rug. Blake then stopped coloring and looked out the window in the direction of the Davis home and said, "Daddy's mad."[54]

Blake's statements to Porter qualified as an excited utterance, and that those statements to her and to Sgt. Weisburn were non-testimonial since they were elicited in response to an ongoing emergency – the unexplained and prolonged disappearance of a young pregnant mother who was but two weeks from her delivery date leaving her purse and her two year old son behind. The primary purpose of both Porter and law enforcement was locating Davis and locating

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[53] Tr. Motion Feb. 1, 2008, 8-13.

[54] Tr. Motion Feb. 1, 2008, 42, 44-47, 51-52, 53-54.

her as soon as possible given her pregnant condition and her unexplained disappearance.[55]

At trial, while Cutts did object to the testimony of Sgt. Weisburn with regard to Blake's statements to him,[56] which was overruled by the trial court, Cutts did not object to the trial testimony of Porter concerning Blake's statements to her.[57] Given that Blake's statements to his grandmother are identical to the statements the toddler gave to Sgt. Weisburn, Cutts' challenge to the admission of the latter statements is without merit since he cannot demonstrate prejudice from the admission of the statements to Sgt. Weisburn since he did not object to those same statements to Porter.

The courts below, in making their *Crawford* rulings that the primary purpose of eliciting the statements from Blake about his mother's whereabouts was in response to an ongoing emergency – the sudden and unexplained disappearance of Jessie Davis, a woman whose delivery date was two weeks away, leaving her home, her young child, and her job. The immediate location of the missing woman was not only the primary purpose of both Porter and Weisburn, but would have been the primary purpose of any reasonable and concerned person.

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[55] Tr. Motion Feb. 1, 2008, 76-79.

[56] Tr. Motion Feb. 4, 2008, 221-227.

[57] Tr. Motion Feb. 4, 2008, 84.

The appellate court's ruling was grounded in this Court's *Davis* opinion, as well as the Ohio Supreme Court's application of *Davis*[58] in its *Siler* decision.[59] In following this Court's *Crawford* jurisprudence, the *Siler* court specifically followed this Court's *Davis* decision and differentiated testimonial statements versus nontestimonial statements on the basis of whether the objective primary purpose of the statements was to enable police assistance to meet an ongoing emergency. As *Davis* noted, if the circumstances objectively indicate that there is no ongoing emergency and that the primary purpose of the statements was to establish or prove past events potentially relevant to later criminal prosecution, then the statements would be testimonial in nature, and thus come under *Crawford*'s rubric.

In the instant case, both Porter and Sgt. Weisburn were responding to an emergency – a single pregnant mother who was close to delivery who had been missing from her home for two days. This missing mother had left her two year old son home alone and alerted no one to her disappearance – not her mother, not her employer or fellow work colleagues, not her sister, not her neighbors, not anyone. In addition, signs of violence were present in her home, despite the fact that there were no signs of forced entry. The trial court's decision to believe these two

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[58] *Davis v. Washington*, 547 U.S. 813 (2006).

[59] *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534.

people that their primary purpose in talking to Blake was to find out what had happened to his mother in order to locate and help her was not only supported by the evidence presented, but by common sense and compassion. Davis' disappearance was in fact an ongoing emergency for several days after she was discovered missing. The appellate court's ruling was thus in accordance with this Court's *Crawford-Davis* cases.

VIII. Other Acts Evidence – Character Evidence

Cutts argues in this eighth claim that the trial court erred and abused its discretion in allowing the testimony of Jill Butler, Stephanie Hawthorne, Jennifer Sprout and Todd Porter, which he argues constituted inadmissible other acts evidence. In making this claim, Cutts only makes a general due process argument, while specifically arguing that the decisions of the courts below violated Ohio's evidentiary rule governing other acts evidence.[60] These witnesses testified to statements made by Cutts during the nine days that Jessie and Chloe were missing. Those statements included denials of the whereabouts of Jessie and her baby and hopes that they were still alive showing Cutts' state of mind and activities during this period. Cutts concedes relevance, but argues that

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[60] *See* Ohio Evid. R. 403(B).

their probative value was outweighed by unfair prejudice. Again, Cutts' claim is primarily a state law claim.

Under Ohio law, the admission or exclusion of evidence rests within the sound discretion of the trial court. In order to find an abuse of discretion. Ohio Evid. R. 403(A) provides that '[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. The testimony of Butler was relevant, not because it demonstrated Cutts' marital infidelity, but because she had contact with him on June 13, 2007, the day before the murders, and communicated with him during the nine days that Jessie and Chloe were missing. She visited him at his home and observed his demeanor. Similarly, Sprout talked with Cutts while Jessie and Chloe were missing and observed Cutts crying, saying "he can't believe she is missing." Cutts went to visit Hawthorne after he left Champs Bar and helped to establish a time line for his activities on June 13. He arrived at Hawthorne's home at 1:00 a.m. and stayed until 2:00 a.m. The testimony about Hawthorne's terminated pregnancy of Cutts' child, which occurred in June, 2007 was offered as evidence of motive. And Sprout was offered because it established the time line for the murders.[61] Cutts did not tell Weisburn that he visited

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[61] Tr. II, 535, Tr. III, 623, 644.

Hawthorne that night and her name was discovered when Cutts' cell phone records were obtained.

While the search for Jessie and Chloe continued, Todd Porter, a sportswriter for the *Canton Repository*, was contacted by Mitchell, then Cutts' friend, so that Cutts could tell his side of the story. When Porter arrived, he conducted the taped interview. In that interview, Cutts denied he knew anything about the disappearance of Jessie and hoped that she would be found alive.[62] The interview with Porter became even more significant when Cutts testified, displaying the fake emotional responses he was able to generate when the spotlight was on him.

This evidence had probative value because it went to the heart of the State's burden of proof – that Cutts intended to murder Jessie and her unborn child that night and dispel the myth generated by the defense that it was an accident. The testimony demonstrated his attempts to cover up his crimes.

IX. Consecutive Sentences – Allied Offenses of Similar Import – Merger

Cutts argues that the trial court erred in imposing maximum, consecutive sentences in this case for his convictions for aggravated murder, murder, and aggravated burglary. He specifically argues that

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[62] Tr. III, 818.

the maximum and consecutive sentences are not supported by facts or law, and asserts that the offenses constituted allied offenses of similar import under Ohio law. Once again, Cutts does not make a federal constitutional argument in making this challenge. In addition, his factual argument hinges upon whether the offenses were committed separately or with a separate animus. In essence, Cutts is urging this Court to correct the errors allegedly committed below by the courts in applying state law. Not only does Cutts' argument fail to properly invoke this Court's jurisdiction, but the argument also seeks to have this Court correct the factual determinations of these lower courts. Finally, the evidence did establish a separate animus for the two homicides.

Cutts argues that the offenses he was convicted of constituted allied offenses of similar import under Ohio law, and thus the sentences in this case should have been merged and imposed concurrently. The court of appeals, however, correctly applied Ohio law in determining that the offenses were committed with a separate animus for each, based upon the facts in the record. There were two victims to Cutts' criminal conduct, who were subjected to the separate animus of Cutts. In addition, the aggravated burglary and aggravated murder offenses are not only not allied

offenses of similar import,[63] but the crimes were committed with a separate animus.

X. Capital Specifications in Indictment

Cutts' final argument once again makes only a general due process claim while focusing on state law. His argument deals with the definition of "person" under Ohio law, and its application to the homicide of a viable unborn child. Cutts argues that the trial court should have dismissed the particular death penalty specification that alleged he had caused the death of two or more persons. Cutts' challenge is contingent upon the definition of "person" in the Ohio criminal code, and whether that definition includes an unborn child, and one who was due to be born in two weeks. Cutts argues that his unborn daughter does not qualify as a person.

The court of appeals held as a matter of state statutory law that an "unborn human who is viable" is a person for purposes of Ohio's aggravated murder statute, as well as Ohio's aggravating circumstance of multiple homicide which makes an aggravated murder charge a capital offense. This holding involved the court's interpretation of the definition of "person" in Ohio R.C. 2901.01(B)(1)(a) to specifically include an "unborn human who is viable."

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[63] *See, e.g., State v. Reynolds*, 80 Ohio St.3d 670, 681, 1998-Ohio-171, 687 N.E.2d 1358, 1371 (citing cases).

Aggravated murder is statutorily defined in Ohio in three ways: (1) purposeful death with prior calculation and design; (2) purposeful death while committing, attempting to commit, or while fleeing immediately after committing or attempting to commit certain felonies; and, (3) purposeful death of a person under the age of thirteen. Thus, the class of protected victims in R.C. 2903.01(C) includes children under the age of thirteen and unborn viable fetuses.

Therefore, under Ohio law, a defendant who has purposely killed a pregnant woman and the fetus inside her may be charged, assuming the other material elements of the offenses are present, with aggravated murder for each victim, i.e., the pregnant woman and her unborn child, under subsections (A), (B), and (C). The death of the pregnant woman may result in an aggravated murder charge under either R.C. 2903.01(A) or (B), or both; and the death of the unborn fetus, whether viable or not, may result in an aggravated murder charge under either R.C. 2903.01(B), or both, or under R.C. 2903.01(C) if the unborn child was viable.

In conclusion, R.C. 2929.04(A) should be construed to set forth a criminal offense (in conjunction with R.C. 2903.01). As a result, the more expansive definition of "person" under R.C. 2901.01(B)(1)(a)(ii) to include a viable fetus applies to both the aggravated murder statute and the aggravating circumstances provision of R.C. 2929.04(A). In this case, therefore, the indictment charging Cutts with purposely killing both Jessie Marie Davis and her unborn

child, Chloe, was proper under the law since Chloe qualified as a person for purposes of the aggravated murder charges and the death penalty specifications.

CONCLUSION

For the reasons set forth in this brief in opposition, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

JOHN D. FERRERO,
Prosecuting Attorney,
Stark County, Ohio

RONALD MARK CALDWELL*
Ohio Sup. Ct. Reg. No. 0030663
Assistant Prosecuting Attorney
KATHLEEN O. TATARSKY
Ohio Sup. Ct. Reg. No. 0017115
Assistant Prosecuting Attorney
STARK COUNTY PROSECUTOR'S OFFICE
110 Central Plaza, South
Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7965
RMCaldwe@co.stark.oh.us

**Counsel of Record for Respondent*